Ti Chuee Hiang v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-64-92
ANUAR CJ (MALAYA), EDGAR JOSEPH JR AND WAN ADNAN FCJJ
28 JUNE 1995

Criminal Law *— Dangerous Drugs Act (Malaysia) — Section 39B(1)(a) — Trafficking in dangerous drugs — Failure of prosecution to call agent provocateur or offer him to defence as witness — Whether miscarriage of justice — Dangerous Drugs Act 1952 s 39B(1)(a)*

Criminal Law *— Dangerous Drugs Act (Malaysia) — Section 40(1) — Police informer — Assumed role of agent provocateur later — Whether still protected from disclosure of identity — Whether should be called as witness — Dangerous Drugs Act 1952 s 40*

Criminal Procedure *— Trial — Calling of witnesses — Discretion of prosecution — Failure to call agent provocateur as witness — Failure to offer to defence for cross-examination — Whether miscarriage of justice caused*

In this case, a team of policemen had planned and organized a trap to arrest a drug dealer ('the appellant'). A policeman posed as a heroin buyer, and a meeting with the appellant was arranged through the help of a police informer ('the informer'). According to the prosecution's evidence, negotiations between the appellant and the police for the sale of the heroin, which ended as a concluded deal, was carried out. The appellant was arrested when he was delivering the heroin to the police. The appellant was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for drug trafficking. The appellant's defence that he was an innocent carrier of the heroin, was rejected by the trial judge, who convicted and sentenced him to death. The appellant appealed on the ground that there had been a miscarriage of justice, as the prosecution had failed to either call as a witness, or at least make available to the defence for cross-examination, the informer who had assumed the role of an agent provocateur in this case.

Held, allowing the appeal:

(1) While the prosecution has a complete discretion as to the choice of witnesses to be called at the trial, it also has the duty to call all necessary witnesses essential to the unfolding of the narrative of the prosecution case to establish proof against the accused beyond all reasonable doubt. At the very least, the prosecutor should make them available for cross-examination by the defence. If the prosecution failed to fulfil this duty, the accused must be acquitted.

(2) In the present case, not only that there was a gap in the narrative of the prosecution case without the informer's testimony, but

there was also no suggestion that his testimony would have been hostile to the prosecution or unreliable. The prosecution had failed in its obligation to call and examine him or at least tender him for cross-examination by the defence, or in default, explain why they were unable or unwilling to call him.

(3) The informer in this case had lost the protection from disclosure of identity normally accorded to informers under s 40 of the Act, as his identity was no longer a secret when he assumed the mantle of an agent provocateur by putting the appellant in touch with the police, causing the appellant to be arrested.

(4) There was a serious misdirection by way of non-direction which had occasioned a grave miscarriage of justice in the trial court, as although the counsel for the appellant had criticized the prosecution for failing to call the informer, the judge did not direct his attention to this point at all.

Obiter:

In any event, in this case it would not have sufficed for the prosecution to have merely made the informer available to be called as defence witness, as this would have put the defence at the disadvantage of not having been able to cross-examine him on any point which might support the prosecution case.

[Bahasa Malaysia summary

Di dalam kes ini, sepasukan polis telah merancang dan memasang suatu perangkap untuk menangkap seorang penjual dadah ('perayu'). Seorang pegawai polis telah meyamar sebagai pembeli heroin, dan suatu perjumpaan dengan perayu telah diadakan atas pertolongan seorang pemberi maklumat polis ('pemberi maklumat tersebut'). Mengikut keterangan pihak pendakwa, suatu perundingan telah dijalankan antara pihak polis dengan perayu berhubungan dengan penjualan heroin, dan pada akhirnya suatu urus janji telah tercapai. Perayu ditangkap semasa dia menghantarserah heroin itu kepada polis. Perayu telah dituduh di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') atas pengedaran dadah. Pembelaan perayu bahawa perayu tidak sedar bahawa apa yang dibawa olehnya itu merupakan dadah, telah ditolak oleh hakim perbicaraan, yang telah menyabit dan menjatuhkan hukuman mati ke atasnya. Perayu telah membuat rayuan, atas alasan bahawa suatu salah laksana keadilan telah berlaku oleh kerana pihak pendakwa telah gagal sama ada untuk memanggil sebagai saksi pemberi maklumat tersebut yang telah memainkan peranan sebagai agen provokatur di dalam kes ini, mahupun menyediakannya untuk diperiksa balas oleh pihak pembela.

Diputuskan, membenarkan rayuan ini:

(1) Meskipun pihak pendakwa mempunyai budi bicara yang sepenuhnya berkenaan dengan pilihan saksi yang akan dipanggil

di perbicaraan, ia juga mempunyai tanggungjawab untuk memanggil kesemua saksi yang diperlukan untuk membentangkan naratif kes pihak pendakwa, supaya menunjukkan bukti terhadap tertuduh yang melebihi keraguan munasabah. Sekurang-kurangnya, pendakwa harus menyediakan mereka untuk pemeriksaan balas oleh pihak pembela. Jika pihak pendakwa gagal memenuhi tanggungjawab ini, tertuduh mesti dibebaskan.

(2) Di dalam kes ini, bukan sahaja terdapat suatu lompang di dalam naratif kes pihak pendakwa tanpa testimoni pemberi maklumat tersebut, tetapi juga tidak terdapat cadangan bahawa testimoni beliau akan menentang pihak pendakwa atau tidak boleh dipercayai. Pihak pendakwa telah gagal menjalankan tanggungjawabnya untuk memanggil beliau sebagai saksi dan memeriksanya atau sekurang-kurangnya menyediakan beliau untuk diperiksa balas oleh pihak pendakwa, ataupun jika mereka ingkar, mereka sepatutnya menjelaskan mengapa mereka tidak boleh atau tidak mahu memanggil beliau.

(3) Pemberi maklumat di dalam kes ini telah kehilangan perlindungan supaya identitinya tidak terbongkar, yang biasa diberi kepada pemberi maklumat di bawah s 40 Akta tersebut, kerana identitinya sudah tidak merupakan suatu rahsia lagi apabila beliau telah memainkan peranan sebagai seorang agen provokatur dengan mengaturkan supaya perayu bertemu dengan polis, dan menyebabkan perayu ditangkap.

(4) Terdapat suatu salah arah yang menyebabkan salah laksana keadilan yang serius telah berlaku di dalam mahkamah perbicaraan sebab walaupun peguam bagi perayu telah mengkritik pihak pendakwa kerana ia tidak memanggil pemberi maklumat, hakim telah gagal menumpukan perhatiannya kepada perkara itu.

Obiter

Walau bagaimanapun, di dalam kes ini, adalah tidak mencukupi jika pihak pendakwa hanya menyediakan pemberi maklumat itu untuk dipanggil sebagai saksi pihak pembela, kerana ini akan mengakibatkan kerugian pada pihak pembela kerana mereka tidak dapat memeriksa balas beliau tentang sebarang perkara yang boleh menyokong kes pihak pendakwa.]

Notes

For cases on trafficking in dangerous drugs, see 4 *Mallal's Digest* (4th Ed) paras 56–99; [1989] Mallal's Digest 593–594, 597–599, 607–621; [1990] Mallal's Digest 465–467; [1991] Mallal's Digest 822–824, 826–828, 830, 834–839, 842–844, 846–849; [1992] Mallal's Digest 657–671; [1993] Mallal's Digest 526–538.

For a case on informant evidence under s 40(1) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed) para 100.

For cases on calling of witnesses in criminal proceedings, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2864–2870.

Cases referred to

Adel Muhammed el Dabbah v A-G of Palestine [1944] AC 156; [1944] 2 All ER 139 (folld)
Maxwell v DPP [1934] 24 Cr App Rep 152; [1934] All ER Rep 168 (folld)
R v Oliva [1965] 3 All ER 116; [1965] 1 WLR 1028 (folld)
R v Apostilides (1984) 154 CLR 563 (refd)
R v Balmforth [1992] Crim LR 825 (refd)
R v Harris [1927] 2 KB 587 (folld)
R v Nugent [1977] 3 All ER 662; [1977] 1 WLR 789 (refd)
Richardson v R (1974) 131 CLR 116 (refd)
Seneviratne v R [1936] 3 All ER 36 (folld)
Teh Lee Tong v PP [1956] MLJ 194 (folld)

Legislation referred to

Dangerous Drugs Act 1952 ss 39B(1)(a), 40
Courts of the Judicature Act 1960 s 60

Appeal from: Criminal Trial No 47–9 of 1989 (High Court, Johor Bahru)

Teh Poh Teik (*Teh Poh Teik & Co*) for the appellant.
Kamaruzaman bin Jalil (Deputy Public Prosecutor) for the respondent.

Edgar Joseph Jr FCJ (delivering the grounds of judgment of the court): This appellant was convicted upon a charge that he did on 11 March 1989, in front of the Country Fried Chicken Restaurant, at Jalan Skudai, Johor Bahru, traffic, on his own behalf, in a dangerous drug, to wit, heroin, weighing 112.94g, in contravention of s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and was sentenced to death.

Before us, the conviction had been attacked on a number of grounds but, in the event, we considered that the only point of substance argued by counsel for the appellant concerned the failure of the prosecution to either call, or at least make available to the defence, a witness who, it was said, for a certain time was just an informer but later forsook that role and assumed the mantel of an agent provocateur, thereby occasioning a miscarriage of justice. For brevity and convenience, we shall, unless the context otherwise requires, refer to this witness as 'the informer'.

Now, the whole of the material evidence had been closely and critically examined before us with great care and it is unnecessary to discuss it at any length. Suffice it to say that it was the informer who had enticed the appellant to walk into a deliberate trap, which had been planned and organized by PPP Noorhashim and executed by a team of six police officers led by K/Inspector Mohd Amin bin Abd Raof (PW3) who was

A then attached to Cawangan Anti Dadah, Bukit Aman, Kuala Lumpur, on the date and at the time and place referred to in the charge.

More particularly, the trap involved a certain DPC Lian Kia Hock ('Lian') — a member of the six-man team — acting as an undercover agent by posing as a buyer of the heroin concerned, and the informer who had B previously put Lian in touch with the appellant. Indeed, on the day in question, by prior appointment, Lian driving his Proton Saga No WBL 5697, and accompanied by his colleague, DPC Lim Saw Peng, had picked up the informer in front of a hotel in Jalan Besar, and proceeded directly to the Country Fried Chicken Restaurant, arriving there at about 5.50pm.

C About ten minutes later, a male Chinese, described as a friend of the informer, joined the trio at the same table and he — apparently, at the behest of the informer — telephoned the appellant, inviting him to come over. Having returned to the table, this male Chinese had informed his companions that the seller of the heroin — that is to say, the appellant — would be arriving anon. About 15 to 20 minutes later, the appellant did in D fact arrive, whereupon he was introduced as 'Ah Heng' by the informer's friend to the others. The informer and his friend then departed.

According to the evidence led by the prosecution, what followed were negotiations between Lian and the appellant, for the sale and purchase of the heroin concerned, ending in a concluded deal. Lian then left saying E that he was going out to count and fetch the RM40,000, being the purchase price, which was lying in the boot of his Proton, parked just outside the restaurant. On emerging from the restaurant, Lian gave a pre-arranged signal, signifying that the deal had been concluded, and very shortly after that, the appellant was seen to emerge from the restaurant with a male Chinese — unknown to Lian — both of whom entered a F Daihatsu car parked nearby. A short while later, the appellant emerged from the Daihatsu, carrying a plastic bag which contained the heroin concerned in three packets wrapped in Chinese newspaper, and some clothing, and which the appellant handed to Lian, who after examining its contents, gave a further pre-arranged signal to the arresting party, signifying G that the heroin had been delivered, who then pounced upon the appellant and arrested him.

It was obvious that at the close of the case for the prosecution, neither the informer nor his friend were called by the prosecution or made available to the defence, nor any explanation vouchsafed to the court of H trial for these glaring omissions.

Upon his defence being called, it was equally obvious that the only defence advanced by the appellant was that he was an innocent carrier of the heroin recovered from the plastic bag, having had no knowledge of its presence there. He claimed that he had been asked by one Koh Loh to pass I on the plastic bag, which he believed contained some clothing, to one Tony Yong, a mutual friend and that he had agreed to do so. Accordingly, a meeting point, being the Country Fried Chicken Restaurant, had been arranged, to enable the appellant to collect the plastic bag from Koh Loh.

Without going into the details of the defence case, it would be sufficient to say that the appellant claimed that it was in these circumstances, that he had been inveigled by Koh Loh into appearing at the locus in quo, at the material time, collecting the bag from Koh Loh who had taken it out of the Daihatsu parked nearby, and it was thus that he had got caught in the trap.

At the time he had received the plastic bag, the appellant claimed that Koh Loh had said that Tony Yong's clothing was in the plastic bag, and the appellant believed this, though he had not examined its contents. There was a suggestion in the defence case, that Koh Loh might have been the informer or the informer's friend, though this point was never made clear at the trial.

The appellant denied that he had engaged in any negotiations with Lian for the sale and purchase of heroin.

The defence of the appellant was, however, rejected by the trial judge, who in the event, convicted and sentenced him to death.

We must now direct our attention to the only substantial ground upon which the conviction had been attacked by counsel for the appellant, which we had mentioned in para two of this judgment.

We recognize that the function of the prosecution is to prosecute, and that does not mean that it must discharge the functions both of the prosecution and the defence.

On the other hand, it is clear law that the prosecution must have in court all witnesses from whom statements have been taken, but they have a discretion whether to call them or not. (See *Teh Lee Tong v PP* [1956] MLJ 194.) That discretion, however, must be exercised having regard in the interests of justice, which includes being fair to the accused (per Lord Parker CJ in *R v Oliva*[1965] 3 All ER 116 at p 122 ; [1965] 2 WLR 1028 at p 1035), and to call witnesses essential to the unfolding of the narrative on which the prosecution case is based, whether the effect of their testimony is for or against the prosecution (per Lord Roche in the Ceylon Privy Council case of *Seneviratne v R* [1936] 3 All ER 36 at p 49, applied in *R v Nugent* [1977] 3 All ER 662; [1977] 1 WLR 789).

In *R v Nugent*, Park J sitting in the Central Criminal Court introduced an exception to the rule in *Oliva,* which says that if a potential witness concerned is capable of belief, then it is the prosecutor's duty to call the witness despite the fact that the testimony he will be giving will be inconsistent with the case the prosecution intends to prove (per Lord Parker CJ [1965] 3 All ER 116 at p 122; [1965] 2 WLR 1028 at pp 1035–1036). The exception introduced by Park J being that if in the circumstances the calling of the witness concerned by the prosecution would confuse the jury as to what it is that the prosecution are seeking to prove, then the prosecution would be under no duty to call the witness.

However, in the later case of *R v Balmforth* [1992] Crim LR 825, the Court of Criminal Appeal in England (Staughton LJ, Mckinnon and

A Potter JJ), held that the earlier case of *Nugent* did not qualify the leading authority of *Oliva* being not an exception to the rule enunciated in *Oliva,* but merely an illustration of it. Accordingly, an appeal against conviction on a charge of wounding with intent was successful and the conviction quashed, where the prosecutor relying on *Nugent* elected not to call for examination or to offer for cross-examination by the defence a witness B whom it conceded was capable of belief and whose testimony largely supported the defence case but, on at least one point, supported the prosecution case. The court appears to have held that once it is conceded that such a witness is capable of belief, it is the obligation of the Crown to at least tender him for cross-examination by the defence.

C We note that in *R v Harris* [1927] 2 KB 587 at p 590, Lord Hewart CJ, the presiding judge in the Court of Appeal in England, made the observation that, 'in criminal cases the prosecution is bound to call all the material witnesses before the court, even though they give inconsistent accounts, in order that the whole of the facts may be before the jury.'

D We must mention, lest we be accused of an oversight, that in our search for authority, we have encountered and considered, the cases of *Adel Muhammed el Dabbah v A-G of Palestine* [1944] AC 156; [1944] 2 All ER 139; *Richardson v R* (1974) 131 CLR 116 at pp 119–121 (High Court of Australia) and *R v Apostilides* (1984) 154 CLR 563 at p 575 (High Court of Australia).

E In *Adel Muhammed el Dabbah,* the court said, inter alia, that the prosecution had a complete discretion as to the choice of witnesses to be called, but qualified this by adding that it should be the general practice of the prosecution, if it finds no reason to the contrary, to tender such witnesses (witnesses whose name are on the back of the information) for F cross-examination by the defence.

In *Richardson,* the High Court of Australia (at pp 119–120), gave general guidance to the prosecution as to how it was to approach its task as to the choice of witnesses to be called at the trial and mentioned as examples of factors to be taken into account for this purpose 'whether the G evidence of a particular witness is essential to the unfolding of the Crown case, whether the evidence is credible and truthful, whether in the interests of justice it should be subject to cross-examination by the Crown'. The court then went on to say:

> H What is important is that it is for the prosecutor to decide in the particular case what are the relevant factors, and, in the light of those factors, to determine the course which will ensure a proper presentation of the Crown case conformably with the dictates of fairness to the accused.

And, after referring with approval to the statement by Lord Roche in *Seneviratne v R* that:

> I Witnesses essential to the unfolding of the narratives on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution ...

went on to add:

> ... to avoid any misapprehension we wish to make two observations about it [the statement by Lord Roche]. First, it should be understood in the sense that it proffers advice to the prosecutor as to how he should approach his task and not as a rule of law formulating a duty owed by the prosecutor to the accused. Secondly, there is room for some debate as to what is meant by the opening words of the statement and it should not be read as inhibiting the discretion which the prosecutor has got to call in the Crown case any eyewitness if he judges that there is sufficient reason for not calling him, as, for example, where he can prove that the witness is not a credible and truthful witness. In this event the prosecutor will ensure that the accused is given the opportunity to call the witness.

In *Apostilides*, the High Court of Australia (at p 575) said, inter alia, that a decision of the prosecutor not to call a particular person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice.

Having said that, it is in our view clear law that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial (see, eg *Adel Muhammed el Dabbah v A-G of Palestine* [1944] AC 156 at pp 167–169; [1944] 2 All ER 139 at pp 143–144), the most basic limitation upon prosecutorial discretion in the presentation of a case is that it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfil this obligation — which is nothing less than a statutory duty — the accused must be acquitted.

In the present case, the informer, having regard to his role, was not a mere informer, but had assumed the mantle of an agent provocateur for it was he who had put the appellant in touch with the undercover agent, Lian. Indeed, he was the active instrument without whose intervention, the appellant might never have been even arrested. His identity was no longer a secret and thus, he had lost the protection from disclosure of identity normally accorded to informers under s 40 of the Act.

In these circumstances, he came within the category of witnesses described by Lord Roche in *Seneviratne*, as 'witnesses essential to the unfolding of the narratives on which the prosecution case is based'. The same might be said of the informer's friend.

Yet, neither the so-called informer nor his friend, whose testimony would have been essential to the unfolding of the narrative on which the prosecution case was based, was called by the prosecution or even made available to the defence to be called as defence witnesses nor any explanation vouchsafed to the trial judge for these glaring omissions.

We hasten to add, that in a case such as the present, where it was never suggested by the prosecution that either of these individuals was not capable of belief, it would not have sufficed for the prosecution to have merely made them available to the defence to be called as defence witnesses, as such a course would have put the defence to the disadvantage of not

having been able to cross-examine them on any point on which they might support the prosecution case.

In our view, having regard to the circumstances of the present case, it was the obligation of the prosecution to call and examine these individuals as their witnesses or, at least, to have offered them for cross-examination by the defence, or in default, to have explained why they were unable or unwilling to call them as the case may be. We say so because without their testimony there was a gap in the narrative of the prosecution case. Moreover, there was no suggestion that their testimony would have been obviously hostile to the prosecution or otherwise unreliable, in which case, 'the prosecutor will ensure that the accused is given the opportunity to call the witness' (per the High Court of Australia in *Richardson*).

We also observed that although counsel for the appellant did, in the course of his address in the court below, criticize the prosecution for failing to call the informer, nowhere in his judgment did the judge direct his attention to this point. This, in our view, was a serious misdirection by way of non-direction which had occasioned a grave miscarriage of justice.

Before us, no suggestion was made by the deputy prosecutor that this was a case for the application of the proviso to s 60 of the Courts of Judicature Act 1960. In our view, he was right in not advancing any such suggestion because it would have been impossible for us to come to the conclusion that there was no miscarriage of justice, as we would be in no position to predict what the informer or his friend would have said had they been called by the prosecution, how they would have responded to cross-examination by the defence, and what the effect of their testimony would have been on the mind of the trial judge.

We were thus driven to the inevitable conclusion that the maintenance of the principle involved in this case was more important than the case itself. This is the principle enunciated in *Maxwell v DPP* [1934] 24 Cr App Rep 152 at p 176; [1934] All ER Rep 168 at p 175:

> ... It is often better that one guilty man should escape than that the general rules evolved by the dictates of justice for the conduct of criminal prosecutions should be disregarded or discredited.

The result, therefore, was that we allowed the appeal, quashed the conviction, set aside the sentence of death and acquitted and discharged the appellant.

Appeal allowed.

Reported by Prof Ahmad Ibrahim